

## **THE GOODELL, THE BAD, AND THE UGLY: THE MINIMAL LEVEL OF INTEGRITY IN THE NFL'S DISCIPLINARIAN OF PLAYER**

### **I. INTRODUCTION**

As the 2015 NFL season began, reigning Super Bowl Champions, the New England Patriots, were once more the favorite to compete for a consecutive title, following the return of their superstar quarterback Tom Brady.<sup>1</sup> However, if it had been left up to the discretion of the National Football League's ("NFL") Commissioner Roger Goodell, Brady would have been ineligible to step back into The Patriot's Gillette Stadium until a quarter of the way through the season.<sup>2</sup> Following the divisional championship game in the 2014 season between the Indianapolis Colts and the New England Patriots, Brady became the focal point of media frenzy.<sup>3</sup> Not due to his three touchdown passes that charged a 45-7 blowout,<sup>4</sup> but rather because of another episode of cheating allegations concerning the Patriots organization, which became popularly known as "DeflateGate."<sup>5</sup> Following an extensive investigation after the incident,

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<sup>1</sup> Jason Marcum, [Super Bowl and NFL Odds for 2015-16 Season](http://www.cincyjungle.com/2015/5/11/8584491/super-bowl-nfl-odds-2015-16-season), SB Nation (May, 11 2015), <http://www.cincyjungle.com/2015/5/11/8584491/super-bowl-nfl-odds-2015-16-season>.

<sup>2</sup> Greg Botelho, Ralph Ellis, Jill Martin, [Tom Brady's 4-game Suspension in 'Deflategate' Nullified](http://edition.cnn.com/2015/09/03/us/deflategate-tom-brady-ruling/), CNN (Sept. 4, 2015), <http://edition.cnn.com/2015/09/03/us/deflategate-tom-brady-ruling/>.

<sup>3</sup> Mike Hume, [Condensing Six Months of the Deflategate-Tom Brady-NFL Circus into Five Essential Questions and 25 links](https://www.washingtonpost.com/news/sports/wp/2015/07/30/condensing-six-months-of-the-deflategate-tom-brady-nfl-circus-into-five-essential-questions-and-25-links/), The Washington Post (July 15, 2015) <https://www.washingtonpost.com/news/sports/wp/2015/07/30/condensing-six-months-of-the-deflategate-tom-brady-nfl-circus-into-five-essential-questions-and-25-links/>.

<sup>4</sup> Mike Hume, [Condensing Six Months of the Deflategate-Tom Brady-NFL Circus into Five Essential Questions and 25 links](https://www.washingtonpost.com/news/sports/wp/2015/07/30/condensing-six-months-of-the-deflategate-tom-brady-nfl-circus-into-five-essential-questions-and-25-links/), The Washington Post (July 15, 2015) <https://www.washingtonpost.com/news/sports/wp/2015/07/30/condensing-six-months-of-the-deflategate-tom-brady-nfl-circus-into-five-essential-questions-and-25-links/>.

<sup>5</sup> Steel-Gator, [The Truth About 'Communigate' and the New England Patriots](http://www.behindthesteelcurtain.com/pittsburgh-steelers-opinions-reactions-news-updates/2015/9/14/9319857/the-truth-about-communigate-and-the-new-england-patriots), SB Nation (Sept. 14, 2015). <http://www.behindthesteelcurtain.com/pittsburgh-steelers-opinions-reactions-news-updates/2015/9/14/9319857/the-truth-about-communigate-and-the-new-england-patriots>.

Goodell imposed unprecedented penalties on the superstar quarterback. However, these sanctions did not last very long.<sup>6</sup>

Since his ascent to Commissioner in 2006, Goodell has styled himself as the league's tough sheriff, enforcing disciplinary conduct to clean up an unruly renegade league and restore law and order.<sup>7</sup> The players, however, view Goodell as more tyrannical.<sup>8</sup> His public image and credibility amongst the players has descended for the worst following another unilateral change to the Personal Conduct Policy in 2014, absent any discussion with the National Football League's Players Association ("NFLPA").<sup>9</sup> The policy as it stands permits Goodell, or his appointee, to serve as judge and arbitrator to dictate the disciplinary measures the NFL proscribes as 'conduct detrimental to the league'.<sup>10</sup> Consequently, he has assumed a role of judge, jury, and executioner. Such unchecked broad authority has resulted in inconsistent and arbitrary decisions at the detriment of players.<sup>11</sup>

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<sup>6</sup> Greg Botelho, Ralph Ellis, Jill Martin, Tom Brady's 4-game Suspension in 'Deflategate' Nullified, CNN (Sept. 4, 2015), <http://edition.cnn.com/2015/09/03/us/deflategate-tom-brady-ruling/>.

<sup>7</sup> Jeff Jacobs, Goodell A Humiliated Loser As Brady Gets Another Win, Hartford Courant (Sept. 03, 2015), <http://www.courant.com/sports/football/hc-jacobs-column-tom-brady-deflategate-0904-20150903-column.html>.

<sup>8</sup> Jeffri Chadiha, Players Are Goodell's Toughest Critics, ESPN (May 08, 2012), [http://espn.go.com/nfl/story/\\_/id/7881228/players-nfl-Commissioner-roger-goodell-toughest-critics](http://espn.go.com/nfl/story/_/id/7881228/players-nfl-Commissioner-roger-goodell-toughest-critics) (quote: "the joke around the locker room ...was that goodell is like Xerxes [the rule] in the movie '300.' He can do whatever he wants").

<sup>9</sup> Michael O'Keeffe, NFL Players Association Rips Roger Goodell, League Over Personal Conduct Policy Changes, New York Daily News (Dec. 09, 2014), <http://www.nydailynews.com/sports/football/nflpa-rips-league-personal-conduct-policy-article-1.2039890>.

<sup>10</sup> Michael O'Keeffe, NFL Players Association Rips Roger Goodell, League Over Personal Conduct Policy Changes, New York Daily News (Dec. 09, 2014), <http://www.nydailynews.com/sports/football/nflpa-rips-league-personal-conduct-policy-article-1.2039890>.

<sup>11</sup> Michael O'Keeffe, NFL Players Association Rips Roger Goodell, League Over Personal Conduct Policy Changes, New York Daily News (Dec. 09, 2014), <http://www.nydailynews.com/sports/football/nflpa-rips-league-personal-conduct-policy-article-1.2039890>.

It may come as no surprise then that the history of the interrelations between the NFL franchise owners and the players association encompasses the most litigious and contentious labor relation history of the major professional sport leagues, and still continues today.<sup>12</sup> Part II of this article will first trace the history of the NFL and their governing documents, the NFLPA, and the rise of Roger Goodell. Part III analyzes arbitration laws, the overt disregard by the Commissioner to abide such laws, and the recent cases resulting from the Commissioner's arbitrary decision that have been appealed to the federal courts. Part IV will provide a solution that the union should force the hand of the league to enter the bargaining process on the question of player conduct, how punishment will be meted out, with neutral arbitrators looking over the Commissioner's imposition of discipline.

## II. THE HISTORY OF LABOR RELATIONS IN THE NFL

### *A. THE RISE OF THE NATIONAL FOOTBALL LEAGUE'S COMMISSIONER AND THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION*

Soon after the 1919 Major League Baseball World Series between the Cincinnati Reds and the Chicago White Sox, details emerged that several White Sox players accepted payment to fix the World Series.<sup>13</sup> The controversy threatened the game's integrity and demanded a response by the League. To restore the public's confidence, club owners consolidated power in the hands of an honorable appointee.<sup>14</sup> The owners approached United States District Judge

<sup>12</sup> Chris Deubert, Glenn M. Wong, John Howe, All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Agreement in the National Football League, 19 UCLA Ent. L. Rev. 1, 6 (2012).

<sup>13</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 Tex. Rev. Ent. & Sports L. 179, 183 (2010).

<sup>14</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 Tex. Rev. Ent. & Sports L. 179, 184 (2010).

Kenesaw Mountain Landis, a man of reputable integrity,<sup>15</sup> to do just that.<sup>16</sup> Landis' sole condition was that he demanded unrestrained authority. Ultimately the owners were induced to draft a governing document detailing the newly created Commissioner position, and granting near absolute power.<sup>17</sup> The governing document would later be known as the Major League Agreement.<sup>18</sup> The agreement's "best interests" provision provided the majority of the Commissioner's authority.<sup>19</sup> This clause allowed the Commissioner to investigate and take "preventative, remedial or punitive action" against anyone that he considered is acting "detrimental to the 'best interest' of baseball."<sup>20</sup> In 1941, the National Football League soon followed suit, appointing a Commissioner and affording him similar power through their respective league by-laws.<sup>21</sup>

As a measure of attaining a balance of power against the league, the NFL players unionized in 1956, forming the National Football League Players Association.<sup>22</sup> League owners

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<sup>15</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 184 (2010).

<sup>16</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 184 (2010).

<sup>17</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 184 (2010).

<sup>18</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 184 (2010).

<sup>19</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 184 (2010).

<sup>20</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 185 (2010).

<sup>21</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 185 (2010).

<sup>22</sup> Peter Goplerud III, Collective Bargaining in the National Football League: A Historical and Comparative Analysis, 4 **Vill. Sports & Ent. L.J.** 13, 14 (1997).

had originally scoffed at the idea of negotiating with the NFLPA, until in 1957 when the Supreme Court decision in William Radovich v. National Football League compelled the NFL to bargain with the union.<sup>23</sup> Radovich was a former NFL lineman who challenged the NFL Clubs' restriction on players' limited ability to offer their services on a free market.<sup>24</sup> The court held that the NFL is subject to antitrust laws under the Sherman Antitrust Act due to "the volume of interstate business involved in organized professional football,"<sup>25</sup> which is an integral component of labor negotiations.<sup>26</sup> The result of Radovich provided the courts for the players' as recourse for their grievances. Thus, with the power to pursue suit, it granted an emergence of NFLPA power through credibility to threaten the NFL with an antitrust lawsuit.<sup>27</sup>

Once more, Major League Baseball furthered labor relations in professional sports when the National Labor Relations Board ("NLRB") established its jurisdiction over professional sports leagues following the American League of Professional Baseball Clubs v. Association of National Baseball League Umpires.<sup>28</sup> The NLRB held the National Labor Relations Act

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<sup>23</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 **Conn. L. Rev.** 1581, 1587 (2008).

<sup>24</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 **Conn. L. Rev.** 1581, 1587 (2008).

<sup>25</sup> Radovich v. National Football League, 352 U.S. 445, 449-452 (1957)

<sup>26</sup> Chris Deubert, Glenn M. Wong, John Howe, All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Agreement in the National Football League, 19 **UCLA Ent. L. Rev.** 1, 7 (2012).

<sup>27</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 **Conn. L. Rev.** 1581, 1587 (2008).

<sup>28</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 197 (2010).

(“NLRA”), which grants the players to unionize and to negotiate the terms of employment and other related subjects for their members through the collective bargaining process, applied to professional sports leagues.<sup>29</sup>

By virtue of this case, certain mandatory subjects of the collective bargaining process must be met to protect the effectiveness and legitimacy of the agreement; hours, wages, working conditions, the power of the Commissioner, as well as disciplinary measures and grievance procedures.<sup>30</sup> The league and the players’ union are thus obliged to conduct the collective bargaining agreement through bona fide, arms-length negotiations.<sup>31</sup> If, however, the league or the players’ union refuses to negotiate in good faith on a mandatory subject of the collective bargaining agreement, or if the Commissioner unilaterally implements a mandatory subject, such action constitutes a violation of the duty to collectively bargain and results in unfair labor practices.<sup>32</sup> The NFLPA registered with the U.S. Department of Labor as a labor union, and under the leadership of Edward Garvey as the NFLPA’s executive director, and Daniel Schulman as the union’s legal counsel, the union signed their first Collective Bargaining Agreement with league owners 1968.<sup>33</sup>

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<sup>29</sup> Matthew Parlow, Professional Sports League Commissioners’ Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 197 (2010).

<sup>30</sup> Matthew Parlow, Professional Sports League Commissioners’ Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 197 (2010).

<sup>31</sup> Matthew Parlow, Professional Sports League Commissioners’ Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 198 (2010).

<sup>32</sup> Matthew Parlow, Professional Sports League Commissioners’ Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 198 (2010).

<sup>33</sup> Genevieve F.E. Birren, A Brief History of Sports Labor Stoppages: The Issues, The Labor Stoppages and Their Effectiveness (Or Lack Thereof), 10 **DePaul J. Sports L. & Contemp. Probs.** 1, 10 (2014).

The relative success achieved under Garvey continued until the expiration of the 1977 agreement.<sup>34</sup> In an effort to negotiate for an increase in players' guaranteed money from the owners,<sup>35</sup> the players went on a 57-day strike that resulted in cancelled games through the 1982 season.<sup>36</sup> The two sides finally reached a new collective bargaining agreement that same year, however, many believed the owners had "won" the strike because of the financial benefits provided to owners.<sup>37</sup> Consequently, Garvey lost his much of his support as union leader<sup>38</sup> and left the following year.<sup>39</sup>

Gene Upshaw replaced Garvey that year as executive director of the NFLPA.<sup>40</sup> However, critics of Upshaw scrutinized his close relationship to NFL ownership<sup>41</sup> and his history of supporting the Commissioner's office.<sup>42</sup> For such reasons many believed he did better for the

<sup>34</sup> Chris Deubert, Glenn M. Wong, John Howe, All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Agreement in the National Football League, 19 **UCLA Ent. L. Rev.** 1, 9 (2012).

<sup>35</sup> Genevieve F.E. Birren, A Brief History of Sports Labor Stoppages: The Issues, The Labor Stoppages and Their Effectiveness (Or Lack Thereof), 10 **DePaul J. Sports L. & Contemp. Probs.** 1, 12 (2014).

<sup>36</sup> Chris Deubert, Glenn M. Wong, John Howe, All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Agreement in the National Football League, 19 **UCLA Ent. L. Rev.** 1, 9 (2012).

<sup>37</sup> Peter Goplerud III, Collective Bargaining in the National Football League: A Historical and Comparative Analysis, 4 **Vill. Sports & Ent. L.J.** 13, 25 (1997).

<sup>38</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 **Conn. L. Rev.** 1581, 1589 (2008).

<sup>39</sup> Chris Deubert, Glenn M. Wong, John Howe, All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Agreement in the National Football League, 19 **UCLA Ent. L. Rev.** 1, 25 (2012).

<sup>40</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 **Conn. L. Rev.** 1581, 1549 (2008).

<sup>41</sup> Les Carpenter, Upshaw Defends Handling of Claims, Washington Post (Sept. 5, 2007)  
<http://www.washingtonpost.com/wp-dyn/content/article/2007/09/04/AR2007090402326.html>

<sup>42</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 **Conn. L. Rev.** 1581, 1621 (2008).

league he opposed than the players he represented.<sup>43</sup> Under Upshaw, NFL owners unilaterally empowered former Commissioner Paul Tagliabue to institute the league's first Personal Conduct Policy ("Conduct Policy") in May 2000 without any opposition, allowing discipline for off-the-field conduct within the purview of the Commissioner.<sup>44</sup> Although encouraging professional athletes to act responsibly on and off the field is undoubtedly a laudable goal, the economic repercussions of misconduct entice the league and owners to discipline athletes. The Personal Conduct Policy was enacted in response to an inflation of player's criminal behavior off the field, as the negative publicity threatened fan attendance, sales in merchandise and concessions, and sponsorships.<sup>45</sup>

Here, Upshaw failed in at least three respects in his commitment to serve the best interest of the NFL players. First, he should have contended that the Personal Conduct Policy should be collectively bargained under the CBA in order for the NFLPA to retain some benefit for the players in exchange of conferring the players' ability to appeal their suspensions.<sup>46</sup> Second, Upshaw and the NFLPA should have attacked the Canadian Football League's ("CFL") rule

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<sup>43</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581, 1549 (2008).

<sup>44</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581(2008).

<sup>45</sup> Matthew Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 Tex. Rev. Ent. & Sports L. 179, 182 (2010).

<sup>46</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581 (2008).

barring suspended NFL players from the league as a violation of antitrust law.<sup>47</sup> By not doing so, players ineligible to play in the unique industry of professional football, will be unable to find alternative employer.<sup>48</sup> This ultimately weakens a player's bargaining position because he is limited in alternative opportunity for employment. Lastly, although other professional sport organizations such as the National Basketball Association ("NBA") and Major League Baseball ("MLB")<sup>49</sup> provide for expanded appeal rights of suspended players under a neutral arbitrator, NFL players lone option of appeal is to the Commissioner, the same man who imposed the penalty.<sup>50</sup>

The policy did not garner much attention, though, mainly because Commissioner Tagliabue had not suspended any player under the former Conduct Policy for more than a few number of games.<sup>51</sup> It was not until Goodell's introduction as the league's Commissioner in

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<sup>47</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581, 1589 (2008).

<sup>48</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581, 1589 (2008).

<sup>49</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 Val. U. L. Rev. 359, 361 (2010).

<sup>50</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581, 1586 (2008).

<sup>51</sup> Marc Edelman, Are Commissioner Suspensions Really Any Different From Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restraints Trade, 58 Cath. U.L. Rev. 631, 637 (2009).

2006<sup>52</sup> that the policy evolved and was employed to enforce strict punishment under a broader disciplinary authority.<sup>53</sup>

### *B. Governing Documents of the NFL*

The disciplinary structure of the NFL is prescribed by four documents: the Constitution and Bylaws, the Player Contract, the Collective Bargaining Agreement (“CBA”), and the Personal Conduct Policy.<sup>54</sup> The governing documents shape the authority of and methods available to the Commissioner for disciplining players, as well as how an appeal of disciplinary action is heard.<sup>55</sup>

The Constitution and Bylaws had originally been the source of the Commissioner’s authority, and gave the Commissioner near absolute power stemming from the “best interests” clause of the document.<sup>56</sup> However, following the formation of the NFLPA and the league’s first CBA, the Constitution is now treated as a helpful guidance in interpreting the Commissioner’s

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<sup>52</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union’s Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 **Conn. L. Rev.** 1581, 1585 (2008).

<sup>53</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 363 (2010).

<sup>54</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 375 (2010).

<sup>55</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 375 (2010).

<sup>56</sup> Matthew Parlow, Professional Sports League Commissioners’ Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 184 (2010).

authority.<sup>57</sup> The CBA governs the terms and conditions of employment in the league,<sup>58</sup> and acts as the ‘supreme governing authority’ to define the parameters of the Commissioner’s power, including the power to discipline players.<sup>59</sup>

Specifically, Article VIII and Article XI of the NFL CBA are most critical for players as it stipulates the disciplinary authority of the Commissioner, as well as each club, has over its players.<sup>60</sup> Article VIII states numerous infractions with the corresponding sanctions for which a team may punish a player, including additional infractions of ‘conduct detrimental to the club’.<sup>61</sup> Article XI extends the Commissioner’s ability to resolve situations involving players, coaches, owners, and NFL employees.<sup>62</sup> The key issue in the CBA lies in Article XLVI, which details the Commissioner’s ability to discipline players for “conduct detrimental” to the integrity of, or public confidence in, the profession.<sup>63</sup>

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<sup>57</sup> Matthew Parlow, Professional Sports League Commissioners’ Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 196 (2010).

<sup>58</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 377 (2010).

<sup>59</sup> Matthew Parlow, Professional Sports League Commissioners’ Authority and Collective Bargaining, 11 **Tex. Rev. Ent. & Sports L.** 179, 196 (2010) (“[w]hile the constitution of a league may purport to give its Commissioner unlimited authority to impose discipline, that authority may be curtailed or subject to outside review as a result of the collective bargaining process and provisions incorporated into the collective bargaining agreement.”).

<sup>60</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 376 (2010).

<sup>61</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 376 (2010).

<sup>62</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 376 (2010).

<sup>63</sup> National Football League Collective Bargaining Agreement, at 206 (2011) available at <http://nflaborfiles.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

Under the NFL CBA, players have two processes for appeal, the Non-Injury Grievance procedure under Article IX and an appeal to the Commissioner.<sup>64</sup> Players disciplined by the Commissioner for conduct detrimental to the integrity of, or public confidence in, professional football can appeal to the Commissioner in writing, upon which the Commissioner, or a person designated by the Commissioner, will preside over a hearing.<sup>65</sup> The Non-Injury Grievance procedure governs disputes over team disciplinary actions, permitting players to file a grievance that will then be heard and ultimately decided by selected arbitrators.<sup>66</sup> Although Article IX on its face appears to provide players an opportunity for independent arbitration, a clause in the opening section supersedes its application, by mandating players to use any alternative dispute resolution procedure in the CBA, which includes an appeal to the Commissioner.<sup>67</sup>

Players are subject to such authority mandated in the standard Player Contract provided in the CBA.<sup>68</sup> Section 15 of the standard Player Contract Form provides that

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<sup>64</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 378 (2010).

<sup>65</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 379 (2010).

<sup>66</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 378 (2010).

<sup>67</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 379 (2010).

<sup>68</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 378 (2010).

“[p]layer … acknowledges his awareness that if [the player] is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or profession football, the Commissioner will have the right … after giving [the] Player the opportunity for a hearing … to suspend Player for a period certain or indefinitely …”<sup>69</sup>

Thus, the agreement makes it clear that the Commissioner may discipline for conduct that reflects poorly on the character and integrity of the game or the player, whatever he defines it to be.<sup>70</sup> Additionally, despite the list of punishments and appropriate fine amounts are provided in the Constitution, Section 8.13(B) provides the Commissioner the ability to recommend an increased punishment when he deems it necessary.<sup>71</sup> If the owners and an executive committee accept such recommendations, the Commissioner’s decision becomes final and unappealable.<sup>72</sup> Appeals that are brought by the players before the Commissioner, and ultimate arbiter, grants his written decision as the “final and complete disposition of the dispute and will be binding upon

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<sup>69</sup> National Football League Collective Bargaining Agreement, at 256 (2011) available at <http://nfllaborfiles.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

<sup>70</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 378 (2010).

<sup>71</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 377 (2010); See National Football League Collective Bargaining Agreement, at 256 (2011) available at <http://nfllaborfiles.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

<sup>72</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 377 (2010).

the player(s) and Club(s) involved.”<sup>73</sup> Thus, in a sense, granting the Commissioner the power to be judge, jury, and executioner.

In 2014 the Conduct Policy was revised once more, and once again Goodell made the changes without discussion with the NFLPA.<sup>74</sup> The NFL Conduct Committee, a panel of nine NFL owners, was responsible for reviewing the policy and was to recommend changes to the policy going forward.<sup>75</sup> The Commissioner then, under the advisement and recommendation of the committee and various experts across the nation, implemented the new stringent policy with unanimous support from the owners.<sup>76</sup> The standard of conduct in the Conduct Policy under Goodell has been, even more so now, is higher than simply avoiding criminal activity,<sup>77</sup> which, ironically, was the original purpose it was instituted to serve.<sup>78</sup>

### *C. ROGER GOODELL’S ASCENT TO PROMINENCE AND CONTROVERSY*

After Roger Goodell’s college graduation in 1981, he wrote job-seeking letters to every NFL team, including a dozen letters to the league’s office, and he began his slow ascent to

<sup>73</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 377-378 (2010).

<sup>74</sup> Tom Pelissero, NFLPA Files Grievance Over NFL’s New Personal Conduct Policy, USA Today (Jan. 23, 2015), <http://www.usatoday.com/story/sports/nfl/2015/01/23/nflpa-nfl-personal-conduct-policy-grievance/22210307/>.

<sup>75</sup> The New NFL Conduct Policy, CBS News (Dec. 09 2014), <http://www.cbsnews.com/htdocs/pdf/NFL Domestic violence policy.pdf>

<sup>76</sup> Tom Pelissero, NFLPA Files Grievance Over NFL’s New Personal Conduct Policy, USA Today (Jan. 23, 2015), <http://www.usatoday.com/story/sports/nfl/2015/01/23/nflpa-nfl-personal-conduct-policy-grievance/22210307/>.

<sup>77</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 377-378 (2010).

<sup>78</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union’s Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 **Conn. L. Rev.** 1581(2008).

Commissionership.<sup>79</sup> As the league's executive vice president, and Tagliabue's former right-hand man, Goodell not only gained recognition in his efficiency in all facets of the NFL's business — supervising all league business operations, marketing and sales, productions, international, stadium development, football operations, and officiating<sup>80</sup> — but also amassed relationships with influential club owners.<sup>81</sup> Goodell spent time at team facilities, worked closely with key owners and facilitated to demands. More importantly, he cultivated relationships with the NFL's most powerful owners — Dan Rooney, Jerry Jones, Robert Kraft, and Jerry Richardson.<sup>82</sup> When Tagliabue stepped down as Commissioner, an eight-person committee comprised of Richardson, Rooney, Jones, and Kraft, among others, selected Goodell as his replacement.<sup>83</sup>

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<sup>79</sup> Patrick Hraby, Roger Goodell's Tragic Sanctimony, The Atlantic (Sept. 12, 2014), <http://www.theatlantic.com/entertainment/archive/2014/09/roger-goodells-the-nfls-nixon-on-the-ray-rice-scandal/380112/>.

<sup>80</sup> Ben Volin, Why Do NFL Owners Still Back Roger Goodell as Commissioner?, The Boston Globe (July 25, 2015), <https://www.bostonglobe.com/sports/2015/07/24/Commissioner-roger-goodell-job-money-bank/Fp5z6XtINLsEcoMQzBO1QI/story.html>.

<sup>81</sup> Kent Babb, How Roger Goodell Became the Most Powerful Man in American Sports, The Washington Post (Sept. 3, 2015), [https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8\\_story.html](https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8_story.html).

<sup>82</sup> Kent Babb, How Roger Goodell Became the Most Powerful Man in American Sports, The Washington Post (Sept. 3, 2015), [https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8\\_story.html](https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8_story.html) (“Goodell spent time at team facilities and learned the figures involved in league politics — the “key owners,” as Tagliabue put it. Goodell spent time with Dan Rooney, the Steelers’ owner who would later be named U.S. ambassador to Ireland, on the potential of moving a franchise overseas. Goodell worked closely with Wellington and John Mara, one of a fading number of NFL legacy families, and shared a respect for the league’s traditions. He grew close with Richardson as a new franchise was awarded to Charlotte, and with Kraft in the mid-1990s as the Patriots remained in the Boston area and construction on a new stadium began in 2000. When Jones antagonized the NFL over franchises’ entitlement to apparel licensing revenues, it was Goodell who understood the Cowboys owner’s argument and presented it within the league office.”)

<sup>83</sup> Kent Babb, How Roger Goodell Became the Most Powerful Man in American Sports, The Washington Post (Sept. 3, 2015), [https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8\\_story.html](https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8_story.html).

Upon Goodell's appointment as Commissioner in 2006, he immediately took action to fix the image of the league by enacting additional strict conduct policies that fundamentally granted him the ability to discipline players for off-the-field behavioral problems in whatever fashion he found appropriate.<sup>84</sup> In his first year as Commissioner during the league's off-season, he formally announced the new Conduct Policy and soon after issued a season-long suspension to Adam "Pacman" Jones, and an eight-game suspension of Chris Henry without pay, in addition to many more.<sup>85</sup> After two seasons, Goodell had issued a dozen player suspensions, more than Tagliabue's final five years as Commissioner.<sup>86</sup>

Because the collective bargaining agreement had been extended prior to Goodell's arrival, the Conduct Policy was not implemented through collective bargaining.<sup>87</sup> Consequently, Goodell enforced the Conduct Policy unilaterally through his powers as Commissioner.<sup>88</sup> By way of the NFL's Constitution and By-laws, the Commissioner has the authority to "establish policy and procedure in respect to the provisions of the Constitution and By-Laws and any

<sup>84</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581, 1591 (2008).

<sup>85</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581, 1591-1592 (2008).

<sup>86</sup> Kent Babb, How Roger Goodell Became the Most Powerful Man in American Sports, The Washington Post (Sept. 3, 2015), [https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8\\_story.html](https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8_story.html).

<sup>87</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581, 1593 (2008).

<sup>88</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581, 1593 (2008).

enforcement thereof.”<sup>89</sup> Goodell thus utilized the league’s governing documents, including an “ambiguously transcribed” collective bargaining agreement. The agreement demands that “all persons associated with the NFL are required to avoid ‘conduct detrimental’ to the integrity and public confident in the National Football League,” and such misconduct are subject to penalties and suspensions in accordance to his formulated Conduct Policy.<sup>90</sup>

The renewed 2006 CBA was scheduled to expire following the 2013 Super Bowl, though the owners unanimously voted to opt out in May 2008, eliminating the final two years of the deal.<sup>91</sup> After a parade of penalties ranging from six games to full seasons, or more, for various types of inappropriate conduct, it was expected that the NFLPA would negotiate for an improved Conduct Policy, including appropriate appeal rights.<sup>92</sup> However, during the 2011 collective bargaining negotiations, matters were complicated when NFLPA Executive Director Gene Upshaw unexpectedly past away.<sup>93</sup> The following year, the NFLPA elected DeMaurice Smith, a

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<sup>89</sup> Adam B. Marks, Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union’s Members by Not Fighting The Enactment of the Personal Conduct Policy, 40 Conn. L. Rev. 1581, 1594 (2008).

<sup>90</sup> Matthew Parlow, Professional Sports League Commissioners’ Authority and Collective Bargaining, 11 Tex. Rev. Ent. & Sports L. 179, 184 (2010).

<sup>91</sup> Chris Deubert, Glenn M. Wong, John Howe, All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Agreement in the National Football League, 19 UCLA Ent. L. Rev. 1, 14 (2012).

<sup>92</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 Val. U. L. Rev. 359, 361 (2010).

<sup>93</sup> Chris Deubert, Glenn M. Wong, John Howe, All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Agreement in the National Football League, 19 UCLA Ent. L. Rev. 1, 14-15 (2012).

litigation attorney with no prior experience in football or labor negotiations, as its new Executive Director.<sup>94</sup>

In 2011, the two sides announced the agreement of a 10-year collective bargaining agreement, which many found to be a huge victory for the owners.<sup>95</sup> Additionally, the agreed 2011 collective bargaining agreement runs through the 2021 year, and no longer contains an opt-out provision that used to be afforded to the players.<sup>96</sup> Contrast to the benefit the owners received once again, where the value of each NFL team, which averaged \$897 million in 2006, swelled to \$1.43 billion in 2015.<sup>97</sup> The luscious financial inflation has ballooned Goodell's pay – determined annually by the owner-led compensation committee – from \$11 million in his first year to \$44 million in 2012 and \$35 million in 2013.<sup>98</sup>

### **III. THE NEED FOR INTEGRITY: RESOLVING DISPUTES OVER PLAYER DISCIPLINE**

#### *A. ARBITRATION AND IMPARTIALITY*

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<sup>94</sup> Chris Deubert, Glenn M. Wong, John Howe, All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Agreement in the National Football League, 19 **UCLA Ent. L. Rev.** 1, 14-15 (2012).

<sup>95</sup> Ben Volin, Now More Than Ever, We Realize NFL Owners Won, The Boston Globe (July 21, 2013), <https://www.bostonglobe.com/sports/2013/07/20/nfl-owners-destroyed-players-cba-negotiations/ia3c1ydpS16H5FhFEiviHP/story.html> (“No matter how you slice it, the owners obliterated the NFL Players Association and new executive director DeMaurice Smith in the 2011 negotiations.”).

<sup>96</sup> Chris Deubert, Glenn M. Wong, John Howe, All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Agreement in the National Football League, 19 **UCLA Ent. L. Rev.** 1, 72 (2012).

<sup>97</sup> Kent Babb, How Roger Goodell Became the Most Powerful Man in American Sports, The Washington Post (Sept. 3, 2015), [https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8\\_story.html](https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8_story.html).

<sup>98</sup> Kent Babb, How Roger Goodell Became the Most Powerful Man in American Sports, The Washington Post (Sept. 3, 2015), [https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8\\_story.html](https://www.washingtonpost.com/sports/redskins/how-roger-goodell-became-the-most-powerful-man-in-american-sports/2015/09/02/3eb69baa-50d8-11e5-9812-92d5948a40f8_story.html).

Arbitration is an alternative mechanism for dispute resolution between two parties to avoid the complicated, slow, formal and expensive court systems.<sup>99</sup> In addition to the alternative benefit of not going through the court system, arbitration is more closely tailored to the individual circumstances of the parties and is a final valid, irrevocable, and enforceable decision.<sup>100</sup> Historically, courts were reluctant to give significant deference to private arbitration awards until Congress enacted the Federal Arbitration Act (“FAA”), which made commercial arbitration agreements legally binding and enforceable.<sup>101</sup> The court system advanced additional governing principles for judicial review of arbitration agreements and awards.<sup>102</sup> In a series of cases known as the “Steelworkers Trilogy,” the court established that judicial review of an arbitrator’s award is very limited, particularly stating that an arbitrator’s award is legitimate if it “draws its essence” from the contract between the two parties.<sup>103</sup> Furthering such principle, the court in United Paperworkers International Union v. Misco, Inc., provided that so long as an arbitrator acts within their authority to properly interpret or apply the arbitration agreement, a court cannot overturn such decision even if the arbitrator has based their decision on a mistake of fact or law.<sup>104</sup>

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<sup>99</sup>Barry Goldman, No, Arbitration Isn't Evil, But Safeguards Are Needed, The Los Angeles Times (Nov. 12, 2015) <http://www.latimes.com/opinion/op-ed/la-oe-1109-goldman-arbitration-20151109-story.html>

<sup>100</sup> Barry Goldman, No, Arbitration Isn't Evil, But Safeguards Are Needed, The Los Angeles Times (Nov. 12, 2015) <http://www.latimes.com/opinion/op-ed/la-oe-1109-goldman-arbitration-20151109-story.html>

<sup>101</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 366 (2010).

<sup>102</sup> See generally United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).

<sup>103</sup> See generally United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 597 (1960) (limiting the judicial review of an arbitrator’s reward); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (discussing how a court should determine whether parties intended to arbitrate a dispute); United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960) (explaining when there is a presumption that a dispute is arbitrable).

Today, arbitration has become a common remedy for labor disputes.<sup>105</sup> Generally, both parties possess roughly equal bargaining power and negotiate a collectively bargained arbitration agreement. The arbitration agreement dictates how the arbitrators will be selected, and jointly determine the procedural rules to be followed.<sup>106</sup>

Professional sports in particular have utilized arbitration to settle labor disputes between leagues and unions.<sup>107</sup> The CBA used in professional sports leagues contains a grievance settlement procedure that is subject to the rules of the National Labor Relations Act (“NLRA”).<sup>108</sup> However, unique to the NFL, relative to other professional leagues, is the Commissioner’s authority to serve as self-appointed arbitrator, or to appoint one of his designees for personal conduct matters.<sup>109</sup> This unique broad authority afforded to the Commissioner under a unilaterally implemented disciplinary structure and appeal rights of the Conduct Policy constitutes a potential violation of the NLRA, which requires both impartiality and collective

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<sup>104</sup> United Paperworkers International Union v. Misco, Inc 484 U.S. 29, 37-38 (1987). (Quote: “A court should not reject the factual findings or the interpretation of the contract by an arbitrator...Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.”)

<sup>105</sup> Barry Goldman, No, Arbitration Isn't Evil, But Safeguards Are Needed, The Los Angeles Times (Nov. 12, 2015) <http://www.latimes.com/opinion/op-ed/la-oe-1109-goldman-arbitration-20151109-story.html>

<sup>106</sup> Barry Goldman, No, Arbitration Isn't Evil, But Safeguards Are Needed, The Los Angeles Times (Nov. 12, 2015) <http://www.latimes.com/opinion/op-ed/la-oe-1109-goldman-arbitration-20151109-story.html>

<sup>107</sup> See General Matthew Parlow, Professional Sports League Commissioners’ Authority and Collective Bargaining, 11 Tex. Rev. Ent. & Sports L. 179 (2010).

<sup>108</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 368 (2010).

<sup>109</sup> Bob Wallace, Neutral Arbitrators in Sports: What Makes It Fair?, Law360 (July 23, 2015) <http://www.law360.com/articles/680682/neutral-arbitrators-in-sports-what-makes-it-fair>.

bargaining pertaining to rules and policies that have a practical effect on working conditions of employees.<sup>110</sup>

Additionally, despite the great deference courts provide, under the FAA courts may still vacate an arbitration award if an arbitrator goes outside the terms of the agreement and “dispenses his own brand of industrial justice.<sup>111</sup> A lack of reasonable procedural protection, such as advance notice of a claim and orderly presentation of evidence, will also lead to the vacation of disciplinary decisions.<sup>112</sup> Under 9 U.S.C. 10(a)(2), other grounds to vacate or modify a decision include if there is a serious conflict of interest on the part of a neutral arbitrator.<sup>113</sup> Courts evaluate evidence of partiality or bias on the basis of whether a reasonable person would conclude that an arbitrator is partial after reviewing the entire circumstance.<sup>114</sup> Historically courts have held evident partiality when the arbitrator’s company was in business negotiations with one of the parties, or being a member of the management team of a party.<sup>115</sup> As such, a

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<sup>110</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 382 (2010).

<sup>111</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 371-372 (2010).

<sup>112</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 371 (2010).

<sup>113</sup> Ann Ryan Robertson and Loraine M. Brennan, The Law on Overturning Arbitration Awards for Partiality Is Confused, 10 **A.B.A. J.** (2009); See also Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 372 (2010).

<sup>114</sup> Labor Arbitration Rules, Am. Arbitration Ass’n §§ 17, (quote “An arbitrator can be removed if he or she has a personal or financial interest in the outcome of the dispute.”).

<sup>115</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL’s Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 374 (2010).

material relationship, such as a business negotiation between the arbitrator and a party, or being a part of the management team of a party, would suffice to meet a standard of evident partiality.<sup>116</sup> Thus, for Goodell to play a dual role as the NFL Commissioner as well as the arbitrator is clear evidence of partiality.<sup>117</sup>

#### *B. FUMBLING DECISIONS: COURTS REVERSE THE COMMISSIONER*

It is inherently likely that Goodell's decisions are biased. Under the "best interest" powers, Goodell is responsible to protect the public image of the league; the same league that determine his annual salary. This raises a conflict of interest in Goodell's incentive to engender an arbitral outcome that aligns with his public image. Additionally, absent a defined standard of "best interest" has allowed Goodell to manipulate penalties in the manner he feels just. Because the NFLPA have not been able to curtail Goodell's power, the league has ultimately left unrestrained authority, albeit in ill-equipped hands. Consequently, his failure to provide sufficient advanced notice of a claim, provide an orderly presentation of evidence, and a lack of reasonable procedural protection has impelled the NFLPA to challenge such decisions in a series of highly publicized cases where the arbitration awards have been vacated.

##### i. BOUNTYGATE

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<sup>116</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 372 (2010).

<sup>117</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 372 (2010).

During the 2010 off-season, the New Orleans Saints were investigated after allegations arose accusing the organization of operating a cash-bounty system, where players were issued bonuses for, among other things, violent hits and deliberate injuries to opposing players.<sup>118</sup> Fearing public backlash to what became widely be known as the “BountyGate” scandal, the Commissioner swiftly issued extreme punishments to the New Orleans organization without a thorough investigation or a proper process in effectuating player discipline.<sup>119</sup> The penalties issued included indefinite suspensions to members of the coaching staff, fines to the organization, and a range of suspensions to various Saints’ players.<sup>120</sup> BountyGate was a pivotal case for the NFLPA to challenge the Commissioner’s authority. Four players filed suit against the NFL and Commissioner Goodell, “centered on the scope of Commissioner’s authority and the rights of the players to challenge exercises of that authority.”<sup>121</sup> The NFLPA claimed that Commissioner Goodell lacked the authority to discipline players in such manner under the terms of the CBA, as well as questioned the impartiality of the Commissioner.<sup>122</sup> The NFLPA took a similar position to a previously vacated arbitration decision in Morris v. New York Football Giants, Inc., where the Supreme Court of New York held the Commissioner lacked neutrality

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<sup>118</sup> ESPN [http://espn.go.com/nfl/topics/\\_/page/new-orleans-saints-bounty-scandal](http://espn.go.com/nfl/topics/_/page/new-orleans-saints-bounty-scandal) (last visited Feb. 23, 2013).

<sup>119</sup> Marc Edelman, DeflateGate Ruling Seals Roger Goodell's Legacy As Failed 'Personal Conduct' Czar, Forbes (Sept. 3, 2015), <http://www.forbes.com/sites/marcedelman/2015/09/03/deflategate-ruling-seals-roger-goodells-legacy-as-failed-personal-conduct-czar/>.

<sup>120</sup> Kevin Patra, Sean Payton Dodges Deflategate, Bountygate Talk, Around the NFL (May 17, 2015), <http://www.nfl.com/news/story/0ap300000493031/article/sean-payton-dodges-deflategate-bountygate-talk> (“Head Coach Sean Payton through the 2012 season; fined the organization \$500,000; deprived the team a second-round draft pick in 2012; suspended general manager Mickey Loomis for eight games, suspended assistant head coach Joe Vitt for six games; and defensive coordinator Gregg Williams were suspended indefinitely; Four Saints players were also suspended”).

<sup>121</sup> Adriano Pacifici, Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond, 3 **Berkeley J. Ent. & Sports Law** 93, 107 (2014).

<sup>122</sup> Adriano Pacifici, Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond, 3 **Berkeley J. Ent. & Sports Law** 93, 107 (2014).

and “evident partiality” and was biased with regard to the incident in the case.<sup>123</sup> Though Morris was about a compensation dispute between a team and players, the court ruled that because former Commissioner Tagliabue had previously advocated a position against the players, he lacked neutrality required to arbitrate such claims.<sup>124</sup> The NFLPA in BountyGate advocated a similar position, stating that Goodell made public comments to defend his initial discipline against the players, including advocating that the severe punishments to be upheld.<sup>125</sup> However, before the court could rule on any of the issues in BountyGate, Commissioner Goodell recused himself and appointed his predecessor, Paul Tagliabue, to hear the appeals from the players and further investigate on the matter.<sup>126</sup> Tagliabue’s 20 years of legal experience and 17-year tenure as Commissioner guided his 22-page ruling, which ultimately vacated Goodell’s punishments for the Saints’ involvement, or lack thereof, in the alleged pay-for-injure scandal.<sup>127</sup>

## ii. DOMESTIC VIOLENCE

Then in 2014 former Baltimore Ravens running back Ray Rice was arrested and charged with felony aggravated assault for punching his now wife, Janay Palmer, in the elevator of an

<sup>123</sup> Adriano Pacifici. Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond, 3 **Berkeley J. Ent. & Sports Law** 93, 109 (2014).

<sup>124</sup> Adriano Pacifici. Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond, 3 **Berkeley J. Ent. & Sports Law** 93, 109 (2014).

<sup>125</sup> Adriano Pacifici. Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond, 3 **Berkeley J. Ent. & Sports Law** 93, 110 (2014).

<sup>126</sup> Knox Bardeen, Roger Goodell, NFL Owe Saints a Huge Apology for Bountygate Nonsense, Bleacher Report (Dec. 12, 2012), <http://bleacherreport.com/articles/1442242-roger-goodell-nfl-owe-saints-a-huge-apology-for-bountygate-nonsense>.

<sup>127</sup> Knox Bardeen, Roger Goodell, NFL Owe Saints a Huge Apology for Bountygate Nonsense, Bleacher Report (Dec. 12, 2012), <http://bleacherreport.com/articles/1442242-roger-goodell-nfl-owe-saints-a-huge-apology-for-bountygate-nonsense>.

Atlantic City casino.<sup>128</sup> Once more Goodell penalized without adequate investigation,<sup>129</sup> suspending Rice for a mere two games for violating the league's Conduct Policy.<sup>130</sup> However, once the casino's surveillance video surfaced to the public, showing Rice punching Palmer unconscious and dragging her body across the floor, Goodell attempted to extend Rice's penalty to suspend him indefinitely.<sup>131</sup> Goodell claimed the video revealed new information that he was unaware of at the time and that Rice had misled him when he made the original ruling.<sup>132</sup> However, that was determined to be a lie.<sup>133</sup> Rice appealed the suspension to federal court on the grounds that he was being suspended twice for the same offense.<sup>134</sup> Judge Barbara Jones agreed with Rice, finding that the NFL had no real evidence that Rice had lied during the league's investigation and was unjustly punished twice for the same misconduct.<sup>135</sup> Accordingly, Jones vacated Goodell's indefinite suspension and reinstated Rice.<sup>136</sup>

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<sup>128</sup> Patrick Hruby, Roger Goodell's Tragic Sanctimony, The Atlantic (Sept. 12, 2014), <http://www.theatlantic.com/entertainment/archive/2014/09/roger-goodells-the-nfls-nixon-on-the-ray-rice-scandal/380112/>.

<sup>129</sup> Tom Ley, Roger Goodell Failed, So Now He's More Powerful Than Ever, Deadspin (Jan. 08, 2015), <http://deadspin.com/roger-goodell-failed-so-now-hes-more-powerful-than-eve-1678306843>.

<sup>130</sup> Tom Ley, Roger Goodell Failed, So Now He's More Powerful Than Ever, Deadspin (Jan. 08, 2015), <http://deadspin.com/roger-goodell-failed-so-now-hes-more-powerful-than-eve-1678306843>.

<sup>131</sup> Patrick Hruby, Roger Goodell's Tragic Sanctimony, The Atlantic (Sept. 12, 2014), <http://www.theatlantic.com/entertainment/archive/2014/09/roger-goodells-the-nfls-nixon-on-the-ray-rice-scandal/380112/>.

<sup>132</sup> Rohan Nadkarni, Ray Rice Wins Appeal, Eligible To Play Immediately, Deadspin (Nov. 28, 2014), <http://deadspin.com/ray-rice-wins-appeal-eligible-to-play-immediately-1664372852>.

<sup>133</sup> Rohan Nadkarni, Ray Rice Wins Appeal, Eligible To Play Immediately, Deadspin (Nov. 28, 2014), <http://deadspin.com/ray-rice-wins-appeal-eligible-to-play-immediately-1664372852>. (quote: "Roger Goodell claimed the video revealed new information — something which all logic points to as a lie").

<sup>134</sup> Rohan Nadkarni, Ray Rice Wins Appeal, Eligible To Play Immediately, Deadspin (Nov. 28, 2014), <http://deadspin.com/ray-rice-wins-appeal-eligible-to-play-immediately-1664372852>.

<sup>135</sup> Rohan Nadkarni, Ray Rice Wins Appeal, Eligible To Play Immediately, Deadspin (Nov. 28, 2014), <http://deadspin.com/ray-rice-wins-appeal-eligible-to-play-immediately-1664372852>.

Days after Goodell announced the league would make an effort to toughen punishment for players' involvement in domestic violence, Minnesota Vikings running back Adrian Peterson was indicted on a felony charge of injury to a child.<sup>137</sup> Goodell immediately placed Peterson on a special exempt list; essentially a paid leave while Peterson's case went through the legal system.<sup>138</sup> Peterson pled no contest to misdemeanor reckless assault for allegedly hitting his four-year-old son with a switch.<sup>139</sup> Soon thereafter, the league suspended Peterson indefinitely.<sup>140</sup> Though Goodell had announced the league's enhanced disciplinary policy calling for only a six-game suspension for first offenses of assault, battery or domestic violence,<sup>141</sup> and despite the fact the new Personal Conduct Policy was not formally approved until December,<sup>142</sup> Goodell refused to consider Peterson's reinstatement until April 15<sup>th</sup>, well after completion of the season.<sup>143</sup> The NFLPA appealed the penalty, whereupon Commissioner Goodell appointed

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<sup>136</sup> Rohan Nadkarni, [Ray Rice Wins Appeal, Eligible To Play Immediately](http://deadspin.com/ray-rice-wins-appeal-eligible-to-play-immediately-1664372852), Deadspin (Nov. 28, 2014), <http://deadspin.com/ray-rice-wins-appeal-eligible-to-play-immediately-1664372852>.

<sup>137</sup> ESPN, Union: [Adrian Peterson to Appeal Ban](http://espn.go.com/nfl/story/_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season), [http://espn.go.com/nfl/story/\\_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season](http://espn.go.com/nfl/story/_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season)

<sup>138</sup> ESPN, Union: [Adrian Peterson to Appeal Ban](http://espn.go.com/nfl/story/_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season), [http://espn.go.com/nfl/story/\\_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season](http://espn.go.com/nfl/story/_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season)

<sup>139</sup> Dan Gartland, [Adrian Peterson's Suspension Overturned on Appeal](http://www.si.com/nfl/2015/02/26/adrian-peterson-suspension-overturned-minnesota-vikings), Sports Illustrated (Feb. 26, 2015) <http://www.si.com/nfl/2015/02/26/adrian-peterson-suspension-overturned-minnesota-vikings>.

<sup>140</sup> Dan Gartland, [Adrian Peterson's Suspension Overturned on Appeal](http://www.si.com/nfl/2015/02/26/adrian-peterson-suspension-overturned-minnesota-vikings), Sports Illustrated (Feb. 26, 2015) <http://www.si.com/nfl/2015/02/26/adrian-peterson-suspension-overturned-minnesota-vikings>.

<sup>141</sup> ESPN, Union: [Adrian Peterson to Appeal Ban](http://espn.go.com/nfl/story/_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season), [http://espn.go.com/nfl/story/\\_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season](http://espn.go.com/nfl/story/_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season)

<sup>142</sup> Tom Pelissero, [NFL Owners Pass New Personal Conduct Policy](http://www.usatoday.com/story/sports/nfl/2014/12/10/roger-goodell-nfl-owners-personal-conduct-policy/20199033/), USA Today (Dec. 10, 2014), <http://www.usatoday.com/story/sports/nfl/2014/12/10/roger-goodell-nfl-owners-personal-conduct-policy/20199033/>.

<sup>143</sup> Jason B. Hirschhorn, [Adrian Peterson Wins Suspension Appeal, NFL Challenges Ruling](http://www.sbnation.com/nfl/2015/2/26/7189311/adrian-peterson-suspension-appeal-result-roger-goodell-vikings), SB Nation (Feb. 26, 2015) <http://www.sbnation.com/nfl/2015/2/26/7189311/adrian-peterson-suspension-appeal-result-roger-goodell-vikings>.

Harold Henderson to hear the arbitration.<sup>144</sup> The NFLPA was concerned about Henderson's neutrality as arbitrator as well due to his history as a long-time NFL Executive and legal consultant for the league.<sup>145</sup> However, the NFL proceeded to appoint Henderson without addressing the union's request for a neutral third-party arbitrator, and Henderson predictably upheld Goodell's discipline of Peterson.<sup>146</sup> Peterson and the NFLPA then announced an appeal in federal court and admonish what they called "the league's inconsistency and unfairness in the process."<sup>147</sup> Judge David Doty vacated Peterson's suspension, finding that Henderson exceeded his authority and displayed complete disregard to "the law of the shop and in doing so failed to meet his duty under the CBA" by upholding Goodell's decision to impose new discipline retroactively.<sup>148</sup>

Many critics believe the NFL's aggressive reaction to Peterson was to regain moral high ground following the Rice fiasco.<sup>149</sup> However, Goodell's abuse of power has resulted in

<sup>144</sup> Jason B. Hirschhorn, Adrian Peterson Wins Suspension Appeal, NFL Challenges Ruling, SB Nation (Feb. 26, 2015) <http://www.sbnation.com/nfl/2015/2/26/7189311/adrian-peterson-suspension-appeal-result-roger-goodell-vikings>.

<sup>145</sup> Mike Florio, Union Questions Harold Henderson's Neutrality, NBC Sports (Nov. 21, 2014) <http://profootballtalk.nbcspor ts.com/2014/11/21/union-questions-harold-hendersons-neutrality/>.

<sup>146</sup> Jason B. Hirschhorn, Adrian Peterson Wins Suspension Appeal, NFL Challenges Ruling, SB Nation (Feb. 26, 2015) <http://www.sbnation.com/nfl/2015/2/26/7189311/adrian-peterson-suspension-appeal-result-roger-goodell-vikings>.

<sup>147</sup> ESPN, Union: Adrian Peterson to Appeal Ban, [http://espn.go.com/nfl/story/\\_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season](http://espn.go.com/nfl/story/_/id/11896187/adrian-peterson-minnesota-vikings-suspended-least-rest-season).

<sup>148</sup> Greg A Bedard, The Peterson Fallout, Sports Illustrated (Feb. 27, 2015), <http://mmqb.si.com/2015/02/27/adrian-peterson-appeal-nfl-roger-goodell-discipline>.

<sup>149</sup> Tom Ley, Roger Goodell Failed, So Now He's More Powerful Than Ever, Deadspin (Jan. 08, 2015), <http://deadspin.com/roger-goodell-failed-so-now-hes-more-powerful-than-eve-1678306843>; See also Michael David Smith, NFL Reviewing Adrian Peterson Under Personal Conduct Policy, ProFootballTalk (Sept. 13, 2014) <http://profootballtalk.nbcspor ts.com/2014/09/13/nfl-reviewing-adrian-peterson-under-personal-conduct-policy/> (quote: "Unfortunately, the **Ray Rice** fiasco has eliminated any trust anyone ever had that the NFL is capable of a competent review of player misconduct").

weakening the considerable power he and the NFL owners have traditionally held over the NFLPA.<sup>150</sup> Goodell's subsequent mishandling and defeat by the NFLPA involving the Tom Brady scandal should prompt league owners to consider changing Commissioner Goodell's role in the disciplinary process,<sup>151</sup> as well as the league's collective bargaining agreement, which has now come under siege.<sup>152</sup>

### iii. DEFFLATEGATE

Judge Richard Berman's decision in DeflateGate marked the fourth straight ruling where an outside arbitrator had overturned Goodell's attempt to unduly punish a player.<sup>153</sup> Following the Baltimore Ravens loss to the New England Patriots in the divisional semi-championship game, an alleged source from the Ravens organization alerted the Colts that there were suspicions the footballs the Patriots were using might have been deliberately underinflated to gain an illegal advantage.<sup>154</sup> The Colts notified NFL officials prior to the game and in the course of the game, Colts linebacker D'Qwell Jackson intercepted a pass thrown by Brady and handed

<sup>150</sup> Tom Ley, Roger Goodell Failed, So Now He's More Powerful Than Ever, Deadspin (Jan. 08, 2015), <http://deadspin.com/roger-goodell-failed-so-now-hes-more-powerful-than-eve-1678306843>.

<sup>151</sup> Mark Maske, NFL Owners To Discuss Changing Roger Goodell's Role in Disciplinary Process, The Washington Post (Sept. 4 2015), <https://www.washingtonpost.com/news/sports/wp/2015/09/04/nfl-owners-to-discuss-changing-roger-goodells-role-in-disciplinary-process/>.

<sup>152</sup> John Breech, Goodell: NFL's DeflateGate Appeal Has 'Nothing To Do' With Tom Brady, CBS Sports (Oct. 28, 2015) <http://www.cbssports.com/nfl/eye-on-football/25356719/goodell-nfls-deflategate-appeal-has-nothing-to-do-with-tom-brady>; See also Mark Maske, NFL Owners To Discuss Changing Roger Goodell's Role in Disciplinary Process, The Washington Post (Sept. 4 2015), <https://www.washingtonpost.com/news/sports/wp/2015/09/04/nfl-owners-to-discuss-changing-roger-goodells-role-in-disciplinary-process/>.

<sup>153</sup> Marc Edelman, DeflateGate Ruling Seals Roger Goodell's Legacy As Failed 'Personal Conduct' Czar, Forbes (Sept. 3, 2015), <http://www.forbes.com/sites/marcedelman/2015/09/03/deflategate-ruling-seals-roger-goodells-legacy-as-failed-personal-conduct-czar/>.

<sup>154</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*6 (S.D.N.Y. Sept. 3, 2015).

the intercepted ball to the Colts equipment staff.<sup>155</sup> The Colts discovered the football was inflated approximately at 11 pounds-per-square inch (“psi”), well below the required 12.5 threshold mandated by the league.<sup>156</sup> A half-time inspection by the NFL officials determined that all 11 of the Patriots’ footballs had in fact been under-inflated well below the normal range specified in the NFL Official Playing Rules.<sup>157</sup> Shortly after the conclusion of the divisional championship game, senior NFL officials undertook an extensive investigation into the details surrounding the use of the under-inflated footballs the Patriots used during the game’s first half.<sup>158</sup> Less than one week following the game, the NFL publicly announced that it had commissioned Theodore V. Wells, Jr. and his law firm to conduct an ‘independent’ investigation, alongside NFL Executive Vice President and General Counsel Jeff Pash.<sup>159</sup>

Upon the findings made by the Pash and Wells (“Wells”) report, the investigation concluded that it was “more probable than not that Brady was at least generally aware,” a standard entirely foreign to the NFL, “of the inappropriate activities of [Patriots Staff] involving the release of air from Patriots game balls”<sup>160</sup> and was in violation of the NFL’s Policy on Integrity of the Game and Enforcement of Competitive Rules (“Competitive Integrity

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<sup>155</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*6 (S.D.N.Y. Sept. 3, 2015).

<sup>156</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*6 (S.D.N.Y. Sept. 3, 2015).

<sup>157</sup> Mike Hume, Condensing Six Months of the DeflateGate-Tom Brady-NFL Circus into Five Essential Questions and 25 links, The Washington Post (July 15, 2015) <https://www.washingtonpost.com/news/sports/wp/2015/07/30/condensing-six-months-of-the-deflategate-tom-brady-nfl-circus-into-five-essential-questions-and-25-links/>.

<sup>158</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*4 (S.D.N.Y. Sept. 3, 2015)

<sup>159</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*4 (S.D.N.Y. Sept. 3, 2015)

<sup>160</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*9 (S.D.N.Y. Sept. 3, 2015)

Policy").<sup>161</sup> Troy Vincent, acting under the authority of the Commissioner,<sup>162</sup> issued Brady a suspension without pay for the first four games of the 2015 season.<sup>163</sup> Brady, through the NFLPA, appealed the suspension upon which Goodell designated himself as the arbitrator to hear Brady's appeal.<sup>164</sup> Additionally, Jeff Pash and his firm were appointed as counsel to the NFL at the hearing; seemingly playing dual and inconsistent roles as "independent" investigator as well as legal counsel to the NFL.<sup>165</sup>

At Brady's arbitration, Goodell denied the NFLPA's request for certain discovery, particularly the contribution by Pash to the Wells Report and the sought testimony of Pash.<sup>166</sup> Goodell justified his decision by claiming Pash's contribution played no role in the disciplinary decisions and did not play a substantive role in the investigation.<sup>167</sup> In predictable fashion, Goodell upheld Brady's four-game suspension and determined that "...Mr. Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme by which, [the Patriots equipment staff] tampered with the game balls."<sup>168</sup> This finding by Goodell went well beyond the "general awareness" finding stated in the Wells report.<sup>169</sup> Goodell then

<sup>161</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*13 (S.D.N.Y. Sept. 3, 2015)

<sup>162</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*16 (S.D.N.Y. Sept. 3, 2015)

<sup>163</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*17 (S.D.N.Y. Sept. 3, 2015)

<sup>164</sup> Marc Edelman, DeflateGate Ruling Seals Roger Goodell's Legacy As Failed 'Personal Conduct' Czar, *Forbes* (Sept. 3, 2015), <http://www.forbes.com/sites/marcedelman/2015/09/03/deflategate-ruling-seals-roger-goodells-legacy-as-failed-personal-conduct-czar/>.

<sup>165</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*26 (S.D.N.Y. Sept. 3, 2015)

<sup>166</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*23-25 (S.D.N.Y. Sept. 3, 2015)

<sup>167</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*24-26 (S.D.N.Y. Sept. 3, 2015)

<sup>168</sup> Transcript of Actual Report: <http://www.sportingnews.com/nfl/story/2015-07-28/tom-brady-roger-goodell-decision-cellphone-destroyed-evidence-cooperation-patriots-equipment-managers>

rationalized his four-game suspension claiming the “closest parallel” for appropriate level of discipline is to impose the same penalty for a first time violation of performance enhancing drugs.<sup>170</sup>

Accordingly, the NFLPA sought to appeal the decision in federal court and once more prevailed.<sup>171</sup> Judge Berman’s decision to vacate Brady’s suspension was premised on three findings: (1) inadequate notice of discipline and misconduct; (2) the Commissioner improperly denied Brady the opportunity to examine co-lead investigator Jeff Pash; (3) the Commissioner improperly denied Brady equal access to investigative files.

Parallel to Judge Jones’s opinion in the Ray Rice matter and Judge Doty’s opinion in Adrian Peterson ‘s case, Judge Berman concluded that once more Goodell had violated the “law of the shop,” and did not provide players with advanced notice of prohibited conduct and the potential discipline.<sup>172</sup> The court determined Brady was punished in accordance with the Competitive Integrity Policy, a policy that is distributed solely to chief executives, club presidents, general managers, and head coaches, but not players.<sup>173</sup> Additionally there is no notice in NFL policy or precedent that a player may be subject to discipline for ‘general awareness’ of another person’s alleged misconduct,<sup>174</sup> let alone that the punishment for such

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<sup>169</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*9 (S.D.N.Y. Sept. 3, 2015)

<sup>170</sup> Transcript of Actual Report <http://mweb.cbssports.com/nfl/eye-on-football/25252557/roger-goodell-steroid-use-is-closest-parallel-for-tom-bradys-actions>

<sup>171</sup> See General NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662 (S.D.N.Y. Sept. 3, 2015)

<sup>172</sup> Brady Case p. 542 – and include the case it cites “Langhorne”

<sup>173</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*50 (S.D.N.Y. Sept. 3, 2015)

<sup>174</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*43 (S.D.N.Y. Sept. 3, 2015)

awareness would be the equivalent of the discipline imposed upon a player who used performance-enhancing drugs.<sup>175</sup>

The court also refuted the NFL Council's argument that Brady's suspension was partly due to his alleged obstruction of League investigation.<sup>176</sup> The court referenced former Commissioner Tagliabue observation in his investigation of the BountyGate, where the NFL had fined Brett Favre \$50,000 for obstruction of a League sexual harassment investigation, but did not suspend him.<sup>177</sup> With respect to the Bounty-Gate decision, the court quotes,

“When it is clear that the arbitrator must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract [] and not incorporated in it by reference . . . the arbitrator has failed to draw the award from the essence of the collective bargaining agreement.”

The court mentions BountyGate and Rice once more in reference to Goodell's failure to adhere to arbitration requirements.<sup>178</sup> In accordance to NFL precedent under Article 46 arbitration appeals, players must be afforded the opportunity to confront their investigators.<sup>179</sup> The Court noted Pash's modified role from “independent” investigator to NFL's retained counsel at the arbitration hearing might have afforded Goodell access to valuable impressions, insight

<sup>175</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*35 (S.D.N.Y. Sept. 3, 2015)

<sup>176</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*41 (S.D.N.Y. Sept. 3, 2015)

<sup>177</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*41 (S.D.N.Y. Sept. 3, 2015).

<sup>178</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*55-56 (S.D.N.Y. Sept. 3, 2015)

<sup>179</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*55-56 (S.D.N.Y. Sept. 3, 2015)

and other investigative information that was not presented to Brady.<sup>180</sup> Commissioner Goodell's denial of the NFLPA's motion to produce sought testimony of Pash and investigative files for Brady's use at the arbitral hearing was fundamentally unfair and in violation of the Federal Arbitration Act<sup>181</sup> and prejudiced Brady as a result.<sup>182</sup>

Despite the immense deference that Congress provides to arbitrators under the Federal Arbitration Act,<sup>183</sup> the NFLPA has successfully prevailed in four straight rulings.<sup>184</sup> Players that are now suspended by Goodell under the same dubious jurisdiction of "conduct detrimental" policy are now more prone to battle their cases in court.<sup>185</sup> The image-conscious league has hit a new low and consequently begs for consideration of a drastic change.

#### **IV. PROPOSED SOLUTION: ALTERNATIVE DISPUTE RESOLUTION PROCESS**

##### **A. FORCED ACTION**

Under Goodell's reign the NFL has amassed relentless success, dominating television ratings and generating approximately \$100 billion in revenue per year, and only continuing to

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<sup>180</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*60 (S.D.N.Y. Sept. 3, 2015)

<sup>181</sup> 9 U.S.C. § 6 10(a)(3) (where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced)

<sup>182</sup> NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*61 (S.D.N.Y. Sept. 3, 2015)

<sup>183</sup> Marc Edelman, DeflateGate Ruling Seals Roger Goodell's Legacy As Failed 'Personal Conduct' Czar, Forbes (Sept. 3, 2015), <http://www.forbes.com/sites/marcedelman/2015/09/03/deflategate-ruling-seals-roger-goodells-legacy-as-failed-personal-conduct-czar/>.

<sup>184</sup> Marc Edelman, DeflateGate Ruling Seals Roger Goodell's Legacy As Failed 'Personal Conduct' Czar, Forbes (Sept. 3, 2015), <http://www.forbes.com/sites/marcedelman/2015/09/03/deflategate-ruling-seals-roger-goodells-legacy-as-failed-personal-conduct-czar/>.

<sup>185</sup> Tom Ley, Roger Goodell Failed, So Now He's More Powerful Than Ever, Deadspin (Jan. 08, 2015), <http://deadspin.com/roger-goodell-failed-so-now-hes-more-powerful-than-eve-1678306843>.

grow.<sup>186</sup> His success in navigating the 2011 NFL lockout<sup>187</sup> and securing a lucrative collective bargaining agreement for owners through the 2021 season, has gained the support of several influential executives, including Jerry Jones, John Mara, Bob McNair, and even Robert Kraft, owner of the New England Patriots.<sup>188</sup> Despite gaining headlines as an icon of controversy and mishandling his recent on-field and off-field disciplinary actions, Goodell seems firmly entrenched in his position and so it is unlikely change is to come. Thus, it is on the NFLPA to take action.

The NFLPA has potential options to pursue an amended CBA. The protections inherent in the arbitration process are absent from the method of discipline for off-field misconduct utilized by the NFL, whose policy contains features that may be impermissible under the FAA or the NLRA. As such, the NFLPA may resort to the NRLB or may pursue suit against the NFL on the same grounds provided in BountyGate; essentially the Commissioner clearly lacks partiality. Additionally, labor stoppages have historically shown to be an effective means for players to combat against their respective leagues.<sup>189</sup> Though the current CBA does not allow the NFLPA to de-franchise or opt-out, the players can still go refuse to play and pursue another lockout. The consequences of such action will leverage bargaining power to the NFLPA. However, such

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<sup>186</sup> Ben Volin, Why Do NFL Owners Still Back Roger Goodell as Commissioner?, The Boston Globe (July 25, 2015), <https://www.bostonglobe.com/sports/2015/07/24/Commissioner-roger-goodell-job-money-bank/Fp5z6XtINLsEcoMQzBO1QI/story.html>.

<sup>187</sup> Tom Ley, Roger Goodell Failed, So Now He's More Powerful Than Ever, Deadspin (Jan. 08, 2015), <http://deadspin.com/roger-goodell-failed-so-now-hes-more-powerful-than-eve-1678306843>.

<sup>188</sup> Ben Volin, Why Do NFL Owners Still Back Roger Goodell as Commissioner?, The Boston Globe (July 25, 2015), <https://www.bostonglobe.com/sports/2015/07/24/Commissioner-roger-goodell-job-money-bank/Fp5z6XtINLsEcoMQzBO1QI/story.html>.

<sup>189</sup> See general Genevieve F.E. Birren, A Brief History of Sports Labor Stoppages: The Issues, The Labor Stoppages and Their Effectiveness (Or Lack Thereof), 10 **DePaul J. Sports L. & Contemp. Probs.** 1 (2014).

action would require the majority of players to protest as they had done in 2011.<sup>190</sup> In doing so, owners will be faced with the potential of losing annual revenue, potential litigation from their investors, and additional cost for litigation against the NFLPA to demand specific performance.<sup>191</sup>

#### B. NEGOTIATED RIGHTS: A NEW CBA

The initial step is to amend the CBA to create a new article for the Personal Conduct Policy following Article XI, Commissioner Discipline, in the CBA. In doing so, there would no longer be any dispute of standard labor and collective bargaining practice violations because it would no longer be the result of unilateral implementation. To collectively bargain for its incorporation and its terms, the NFLPA will receive a quid pro quo for its acquiescence to the Policy. Moreover the Conduct Policy contains a list of conduct that may lead to discipline, however the list is vague and can be interpreted broadly by the Commissioner. Thus, the amended CBA will secure clarity in the system and for players, as well as govern the authority of the Commissioner's discipline.

The amended CBA should also include standard of review that will be negotiated by both parties. Currently, the NFL CBA neglected to define a standard of review applicable for any level of discipline.<sup>192</sup> The implementation of a defined standard ensures further fundamental

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<sup>190</sup> Tom Ley, Roger Goodell Failed, So Now He's More Powerful Than Ever, Deadspin (Jan. 08, 2015), <http://deadspin.com/roger-goodell-failed-so-now-hes-more-powerful-than-eve-1678306843>.

<sup>191</sup> NFL Partners With CBS On 2014 Thursday Night Football Package, CBS Corporation <http://investors.cbscorporation.com/phoenix.zhtml?c=99462&p=irol-newsArticle&ID=1897238> (last visit Jan. 24, 2016)

<sup>192</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 **Val. U. L. Rev.** 359, 401 (2010).

fairness through consistent guidelines to modify or overturn players' punishment.<sup>193</sup> Absent a defined standard, the Commissioner is at liberty to regulate how to review appeals of imposed punishment.<sup>194</sup>

Next, the NFL should consider an independent arbitral tribunal with legal and football training to provide swift, fair, and consistent decisions. The tribunal will consist a minimum of ten arbitrators, who would be appointed by the NFL and the NFLPA.<sup>195</sup>

A two-tiered procedure should be implemented, based on the severity of the punishment imposed; a dispute involving a penalty imposed by the Commissioner that results in a financial impact equivalent of one player's game check or less, and a financial impact of more than the equivalent of one player's game check.<sup>196</sup> According to the severity of the punishment imposed, the tribunal will consist of either a single neutral arbitrator from the tribunal for smaller disputes or a panel of three arbitrators for the larger, where the NFLPA and the NFL each appoint one arbitrator from a list, while the two appointed arbitrators select the third.<sup>197</sup>

## V. CONCLUSION

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<sup>193</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 *Val. U. L. Rev.* 359, 411 (2010).

<sup>194</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 *Val. U. L. Rev.* 359, 401 (2010).

<sup>195</sup> Jeremy Abrams, Making the Right Call: Why Fairness Requires Independent Appeals in U.S. Professional Sports Leagues, 97 *Marq. L. Rev.* 470, 512 (2013).

<sup>196</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 *Val. U. L. Rev.* 359, 407 (2010).

<sup>197</sup> Joshua A. Reece, Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement, 45 *Val. U. L. Rev.* 359, 407 (2010).

The new procedure will ensure impartiality, explicitly limit the best interests authority of the Commissioner, and protect players' rights. Additionally, inserting the appeal procedure directly into the Conduct Policy will further display a bargained for agreement and thus not violate the NLRA and will additionally defines the process better than simply referencing a process in another section of the CBA.